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August 23, 2016

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Written *Ex Parte* Filing, *Terrestrial Use of the 2473-2495 MHz Band for Low-Power Mobile Broadband Networks*, IB Docket No. 13-213

Dear Ms. Dortch:

This responds to the *ex parte* filing by New America/Open Technology Institute ("OTI") dated August 22, 2016 following up on a meeting between Michael Calabrese and Edward Smith of Chairman Wheeler's Office, and follows up on my letter dated August 18, 2016. This is not meant to be a comprehensive response to all of the latest shifts and demands by OTI. Consistent with what Commissioner O'Rielly has pointed out in his past commentary[1], as an "outsider" I

[1] *See, for example*, Commissioner O'Rielly blog posts at:
https://www.fcc.gov/news-events/blog/2014/08/07/post-text-meeting-items-advance
https://www.fcc.gov/news-events/blog/2015/01/16/update-advance-posting-commission-meeting-items
https://www.fcc.gov/news-events/blog/2016/02/24/stop-unfairly-censoring-commissioners

have no way of knowing how much traction the disparate lobbying efforts receive at the FCC, nor who at the agency gives traction to any particular lobbying effort. At some point, the shifting sands in this proceeding become impossible to predict, or even follow in a thoughtful manner. The proposal initially adopted by Commissioners Clyburn, Rosenworcel and Pai was elegant and simple compared to how the record has morphed into a caricature of the NPRM. The metamorphosis occurred, in my opinion, because of unchecked lobbying and gamesmanship when the proceeding should have been grounded in legal principles and technical evidence coupled with an objective cost/benefit public interest analysis.

In a publication released yesterday, Michael Calabrese of New America/Open Technology Institute is quoted as saying:

> The two GOP commissioners are rightly repulsed by the International Bureau's continued efforts to shovel corporate welfare at failing satellite licensees, when in fact the spectrum could be put to better use. Companies relying on Wi-Fi and Bluetooth fear TLPS could disrupt the existing unlicensed ecosystem at 2.4 GHz. [2]

While OTI is busy denigrating Globalstar as a "failing satellite licensee," today that "failing" licensee is hard at work assisting recovery efforts in federally declared disaster areas of Louisiana. [3] I also question the veracity of a claim that Commissioners O'Rielly and Pai have been "repulsed" by the International Bureau's efforts in this proceeding. Based on what I have observed over the past three to four years, the efforts of the International Bureau to find a path forward in spite of all of the gamesmanship by the opposition have been nothing less than tireless. From my perspective as simply a lawyer observing the public record, but as a former employee of another Federal Agency, the staff at the FCC and Globalstar's representatives have been some of the only "adults" in the room. As for OTI's reference to the "fear" of various companies, I have to again point out the failure and, in fact, the inability to reference any compelling or even material

[2] http://www.newamerica.org/oti/wireless-future-project/news/globalstar-problems-seen-bad-sign-other-satellite-spectrum-deals/

[3] *See* http://www.globalstar.com/en/index.php?cid=7010&pressId=939

evidence of such "disruption" in the record. At least industry stakeholders are no longer citing to the "technical analysis" of a hedge fund manager whose sole objective was to drive Globalstar's stock down to zero.[4] Again, based solely on the public record and with no knowledge of any internal FCC activity of the type commented on by Commissioner O'Rielly in the past, I see no compelling or even highly useful evidence that weighs against adopting rules consistent with the NPRM.

This proceeding could be a case study in how ugly a regulatory process can be for an American company simply wanting to carry out its proposed innovative products and services. I'd like to think that our regulators can do much better. Acting Chairwoman Clyburn started the proceeding off in an efficient manner by adopting and releasing the NPRM a little more than a year after Globalstar filed its petition for a rule making. Despite several subsequent filings in this docket making reference to the NPRM being "Globalstar's request," it stopped being that when the Commission, by unanimous vote of the three Commissioners at the time, adopted the NPRM. From that point on, this NPRM has been the Commission's proposal for amending the Federal Rules. I have followed the proceeding closely during its entire pendency and saw the Commission lose its ownership of the process shortly after the pleadings cycle. When the Commission voted in favor of the NPRM, in a bipartisan fashion and without dissenting comment, there was no indication that this proceeding was going to be anything other than a decision based on the objective principles and issues set forth in the NPRM. It is now perhaps the height of irony to have, on the one hand, Democratic Commissioners standing up against purely anti-competitive and unsupported rhetoric from giant technology companies and organizations citing weak, unsupported "concerns" in order to protect their commercial use of the "public" airwaves, while on the other hand have a Republican Commissioner reverse himself and cite "special rights" and "preferential access" as a basis.

In its NPRM, it was the *Commission* that stated:

> The Commission proposes rules that would permit Globalstar to provide low-power ATC using its licensed spectrum at 2483.5–2495 MHz under certain limited

[4] This is not surprising. *See* http://mobile.easthamptonstar.com/News/2016818/Two-Are-Hurt-Crash

> technical criteria and, with the same equipment, to utilize spectrum in the adjacent 2473–2483.5 MHz band pursuant to the applicable technical rules for unlicensed operations in that band. [5]
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> *****
>
> The Commission proposes to modify its part 25 rules in order to allow Globalstar to implement its plan of deploying a low-power terrestrial broadband network in its licensed spectrum from 2483.5–2495 MHz and in the adjacent band at 2473–2483.5 MHz used for unlicensed devices. [6]

And, it was the *Commission* that urged anyone with "concerns" to come forward and place technical evidence in the record:

> To the extent that any party asserts that Globalstar's low-power network may cause interference or substantially constrain other operations, the Commission encourages the party to submit technical analyses detailing their concerns, as well as a detailed assessment of any associated costs. [7]

With regard to "special rights" in the lower half of Channel 14, the NPRM itself gave concerned parties their own opportunity for opening up further Wi-Fi spectrum by asking:

> Would relaxation of the limits in order to enable use of Channels 12 and 13 degrade MSS capabilities, particularly if those capabilities are not deployed on the

[5] Federal Register, Vol. 79, No. 33 at 9446 (February 19, 2014).

[6] *Id.* at 9447.

[7] *Id.*

> same managed basis as Globalstar contemplates for its operations in Channel 14? [8]

Moreover, in this latter regard, the Commission effectively gave Globalstar special rights when it found that limiting OOBE at 2473 MHz – 2483.5 MHz was in the public interest to protect MSS. Today, Globalstar is helping to save lives and assist victims of terrible flooding because of those "special rights." At the same time, Bluetooth device manufacturers accumulated "special rights" in this same band of spectrum by developing and using technology that was rule compliant, compatible with incumbents, and commercially successful. The NPRM adopted by the Commission in this proceeding is consistent with these precedents and is consistent with the National Broadband Plan. Globalstar is seeking rules that establish boundaries, ensure compatibility and, in turn, allow commercially successful use of what is now terrestrially fallow spectrum.

In the three years since since the NPRM was adopted, Globalstar has done the heavy lifting. Globalstar has submitted several technical reports and conducted three comprehensive demonstrations on the record. The reasons why Globalstar has jumped through these hoops while the opposition merely writes in time and time again with references to "possible interference" and "potential interference" and expressions of "caution," "concern" and "fear" are opaque to the public eye. Meanwhile, as mentioned, the public did see one Commissioner publicly vote "no" three weeks after circulation briefly stating that he doesn't believe the company should receive "special rights." For a baby boomer, this entire proceeding and Commissioner Pai's action in particular, conjure up thoughts of Charlie Brown and Lucy in the classic Charlie Brown Thanksgiving Day Special. [9] I don't think I have to spell out who is who in the metaphor. It is impossible to see from the record what evidence could have caused a Commissioner who voted for the initial proposal to reverse himself after circulation. The two sentence statement issued with the pre-decision, public vote sheds no light on an issue that remains unchanged since the *Commission* proposed the mixture of licensed and unlicensed spectrum. Now, again based solely on the ever shifting opposition rhetoric in this proceeding, it appears that the Commission may be handing the football off to OTI.

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[8] *Id.* at 9450.

[9] *See* https://www.youtube.com/watch?v=055wFyO6gag

If I dare use another metaphor, it would again relate to football and, specifically, to continually moving the goal posts.

The unlicensed operators, represented by companies and organizations with vast capital and technical resources such as Wi-Fi Alliance, Bluetooth SIG, Google, Microsoft and others, were given full opportunity in the NPRM itself to submit technical analyses. In response to a specific question in the NPRM, such technical analyses would have allowed the Commission to weigh evidence as to whether Channels 12 and 13 should be opened to unlicensed operations. Because the giant technology interests decided not to participate at all in answering the question, at least one Commissioner as well as OTI (by referring to "corporate welfare") now use that fact against Globalstar through naked allegations of "windfall," "special rights" and "preferential access." But only Globalstar has showed that opening spectrum in the ISM band to further innovative use under the Commission's proposal is in the public interest.

Respectfully, as just a lawyer who has followed this proceeding closely since its beginnings, I am trying to wrap my arms around exactly how complicated the Commission wants to make this proceeding. Earlier this month, Commissioner O'Rielly stated: "I've had trouble getting my arms around exactly what the company would like to offer."[10] I don't know exactly what the Commissioner was referring to (e.g., TLPS in general, or a "use or share" option, or something else), but if I were a representative of the company I would have a fairly simple answer. When asked about "what the company would like to offer," I would reply that the company, like any American dealing with government oversight, wants to know the rules of the road so that it can then map out its business plan accordingly. And, those rules of the road should be as simple and elegant as possible. Perhaps a more appropriate and pointed question in this proceeding is, "after about three years of interaction with interested parties, how does the evidence presented cause the Commission to modify its proposal to achieve a path forward and make use of this terrestrially fallow spectrum for broadband purposes?" After all, it was the *Commission* that proposed the rules in the first place and Globalstar has been urging adoption, so that it can offer services compliant with those rules. Continuing with the baby boomer, pop culture metaphor - it has been Globalstar running up to the football, and attempting to kick it for several years now. The Commission should act unanimously now to adopt rules consistent with its proposal made in 2013.

[10] FCC Press Conference, August 4, 2016.

Pursuant to section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), this ex parte notification is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,

/s/ Kevin G. Rooney

Kevin G. Rooney

cc: Hon. Tom Wheeler, Chairman
Hon. Mignon Clyburn
Hon. Jessica Rosenworcel
Hon. Ajit Pai
Hon. Michael O'Rielly